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In The

# Supreme Court of the United States

October Term, 1994

BOARD OF EDUCATION OF THE CITY OF CHICAGO,

*Petitioner,*

v.

AFFILIATED FM INSURANCE COMPANY,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## BRIEF IN OPPOSITION

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## COUNTER-STATEMENT OF QUESTION PRESENTED

Whether the district court's and the court of appeals' resolution of an issue of Illinois law in a diversity action based upon a determination that Illinois law was settled presents an issue on which this Court should grant a writ of certiorari.

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BOARD OF EDUCATION OF THE CITY OF CHICAGO,

*Petitioner,*

v.

AFFILIATED FM INSURANCE COMPANY,

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**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## BRIEF IN OPPOSITION

Respondent Affiliated FM Insurance Company[1] respectfully submits that petitioner's request for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit be denied.

[1] Pursuant to Rule 29.1, Respondent Affiliated FM Insurance Company states that it is a Rhode Island corporation. Respondent's parent company is Allendale Associates, which is a wholly owned subsidiary of Allendale Mutual Insurance Company. Respondent has no subsidiaries.

## COUNTER-STATEMENT OF OPINIONS BELOW

In an unreported written opinion dated June 2, 1993, the United States District Court for the Northern District of Illinois granted plaintiff-respondent's motion for summary judgment. Pet. App. 9a-15a. The United States Court of Appeals for the Seventh Circuit affirmed the district court's judgment in a May 12, 1994 opinion reported at 23 F.3d 1261 (7th Cir. 1994). Petitioner's petition for rehearing was denied pursuant to a June 7, 1994 Order, which is reproduced at Pet. App. 69a.

## JURISDICTION

Petitioner's jurisdictional statement is complete and correct.

## COUNTER-STATEMENT OF CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This is a diversity action involving the interpretation of Illinois insurance and contract law. Although 28 U.S.C. § 1652 may be tangentially involved in this case, there are no federal statutes or constitutional provisions at issue.

## COUNTER-STATEMENT OF THE CASE

This case arises out of a series of insurance policies written by respondent Affiliated FM Insurance Company ("Affiliated") for petitioner Chicago Board of Education ("the Board") for a period of twelve years from 1978 to

1990. The material facts are undisputed. The policies were solicited through a public bidding process, the Board prepared its own policy specifications, and the Board expressly retained the right to reject any portion of an insurer's bid. The Affiliated policies, complying with the bid specifications and accepted by the Board, required that any suit under the policies be filed within twelve months of the loss. Pet. App. 2a.

The Board was aware of its claimed loss at the very latest by May 1989, but the Board failed to give prompt notice of its claim or file suit within twelve months. The Board submitted its claim to Affiliated on September 4, 1990. Pet. App. 2a. Affiliated denied coverage on October 17, 1990 and immediately instituted an action in the United States District Court seeking a declaration that the Board's claim was not covered under any of the four property policies issued by Affiliated to the Board. Pet. App. 3a. The Board counterclaimed, but its suit was clearly untimely under the twelve-month suit limitations provision in each policy.

After substantial discovery was conducted, relating *inter alia* to the issue of when the Board was aware of its claimed loss, Affiliated moved for summary judgment on several of its defenses, including the suit limitations defense. The motion was referred to a magistrate for a report and recommendation. The magistrate found that it was "beyond doubt" that petitioner knew of its asbestos problem at least sixteen months before filing a claim under its policy. Pet. App. 52a. Nonetheless, the magistrate recommended that the district court deny summary judgment and instead grant the Board immunity from its

contractual breach, based upon the doctrine of "municipal immunity".[2] Pet. App. 56a.

After a comprehensive *de novo* review, the Honorable George W. Lindberg of the United States District Court for the Northern District of Illinois found there was no material issue of fact in dispute concerning the Board's failure to file a claim within twelve months after the claimed loss. Thus, the only legal issue to determine was whether the Board's breach of the contractual provision could be excused by the doctrine of *nullum tempus*. Judge Lindberg distinguished the contractual provision at issue from a statute of limitations, and held that the public rights analysis for governmental immunity from a statute of limitations set forth in *Board of Educ. v. A, C & S, Inc.*, 546 N.E.2d 580 (Ill. 1989) ("*A, C & S*") was simply inapplicable to contractual limitations. Pet. App. 12a-13a. Judge Lindberg predicted that the Illinois Supreme Court, if presented with the issue at bar, would agree with the following statement of the Illinois Appellate Court:

> Plaintiff contends, however, that, as a municipality, it is exempt from the time limit provision. . . . The suit limitations at issue here is neither a statute of limitation, nor an *ultra vires* attempt by a municipal officer to waive the municipality's immunity from the applicable statute. . . . Rather, it is a contractual agreement

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[2] The doctrine is referred to as "*nullum tempus*," which is shorthand for the Latin phrase "*quod nullum tempus occurrit regi*," which means "time does not run against the sovereign." *See, Guaranty Trust Co. v. United States*, 304 U.S. 126, 132 (1938). The doctrine immunizes governmental bodies from forfeiture of claims based on statutes of limitations.

> by which [the town] affirmatively agreed to commence suit on the policy within one year from the date of any covered loss. Plaintiff's complaint affirmatively establishes that plaintiff did not comply with that provision. We therefore conclude that the trial court properly granted [the insurer] judgment on the pleadings and properly denied plaintiff's motion for leave to amend. (citations omitted).

*Village of Lake In The Hills v. Illinois Emcasco Ins. Co.*, 506 N.E.2d 681, 684 (Ill. App. 2 Dist.), *appeal denied*, 515 N.E.2d 128 (Ill. 1987) ("Lake in the Hills"). Moreover, Judge Lindberg noted that public policy considerations supported the grant of summary judgment, since contractual limitations provisions were relied upon by insurance companies to calculate reserves and premiums. Pet. App. 14a. The court observed that if insurance companies were exposed to the unlimited liability that immunity to suit limitation provisions would confer, then it would adversely affect the ability of public entities such as the Board to obtain affordable insurance. Pet. App. 14a. The court rejected the Board's claim of immunity and granted summary judgment based on the Board's failure to file suit within the time provided under the terms of each policy.

The court of appeals affirmed the district court's determination of Illinois law, thus resolving the issue of state law that is at the heart of this case. The court of appeals determined that the Board was not immune from contractual suit limitations under the *nullum tempus* doctrine and specifically rejected petitioner's argument that *A, C & S* mandated an extension of that doctrine to contractual provisions. Pet. App. 4a. The court of appeals

determined that Illinois law was settled that "it is appropriate for suit limitations to be contained in insurance policies", and that public entities are not immune from performing such contractual obligations. Pet. App. 4a. Indeed, the court was so certain that Illinois law was settled that it denied the Board's motion for certification of this issue to the Illinois Supreme Court.[3] Pet. App. 5a.

## REASONS FOR DENYING THE WRIT – SUMMARY OF ARGUMENT

This case concerns the interpretation of Illinois law regarding the validity of suit limitation clauses in contracts negotiated and entered by public bodies. The United States District Court for the Northern District of Illinois and the United States Court of Appeals for the Seventh Circuit determined that Illinois law was clear that such clauses could not be invalidated by the doctrine

[3] Illinois has a certification procedure pursuant to Ill. Sup. Ct. R. 20, and the Seventh Circuit has not hesitated to certify questions of Illinois law, when appropriate, to the Illinois Supreme Court. *See, Todd v. Societe BIC, S.A.*, 9 F.3d 1216 (7th Cir. 1993) (en banc) (question certified), 21 F.3d 1402 (7th Cir. 1994) (en banc) (subsequent opinion deciding issues after certification by Illinois Supreme Court was denied); *Citizens for John W. Moore v. Board of Elec. Comm'rs of Chicago*, 781 F.2d 581 (7th Cir. 1986) (question certified), 487 N.E.2d 946 (Ill. 1986) (refusal to answer question), 794 F.2d 1254 (7th Cir. 1986) (subsequent opinion). In this case, the court of appeals observed that "certification would be inappropriate and probably unsuccessful as we have seen in recent instances where certification has been denied." Pet. App. 6a (citing *Todd*).

of *nullum tempus*. This Court rarely reviews a construction of state law agreed upon by two lower courts. *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 395 (1988) (citing *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985)).

> [O]rdinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts. . . . When we are called upon to decide them, the expression of the views of the judges of those courts, who are familiar with the intricacies and trends of local law and practice, if not indispensable, is at least a highly desirable and important aid to our determination of state law questions. (citations omitted).

*Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944). *See also, Bowen v. Massachusetts*, 487 U.S. 879, 908 (1988) ("We have a settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law." (footnote omitted)). The issue of state law was properly decided at the district court level, and reexamined and affirmed by the court of appeals. The holdings of these lower federal courts should be left undisturbed.

This Court's Rule 10.1 requires a demonstration of special and important reasons for the grant of a petition for a writ of certiorari. In an effort to create the requisite special and important reasons, petitioner has manufactured an issue regarding the Seventh Circuit's interpretation of state law. Petitioner asserts that the Seventh Circuit violates the principles of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) by failing to interpret and predict state law

properly, and that the Seventh Circuit's approach is in conflict with that of other circuits. Neither proposition is correct.

Petitioner improperly asserts that the Seventh Circuit is reluctant to predict issues of state law that have not previously been presented to the state's highest court. This argument ignores the Seventh Circuit's careful deliberation of state law generally and in the case below. The Seventh Circuit considered Illinois precedent and determined that Illinois law was settled in this matter. The court considered the caselaw and arguments briefed by the parties and had no reluctance to determine state law. Petitioner has created a false issue.

Even if petitioner's interpretation of Seventh Circuit cases were accurate, the purported conflict in the circuits bears no relationship to the controversy presented below. The issue presented below concerned the validity and enforceability of a contractual limitations period against a public body, and such clauses have been upheld in Illinois and throughout the nation.

### A. PETITIONER FAILS TO PRESENT A SPECIAL OR IMPORTANT ISSUE BECAUSE THE COURTS BELOW PROPERLY CONSIDERED ILLINOIS PRECEDENT AND PREDICTED THE DETERMINATION OF THE ILLINOIS SUPREME COURT.

Petitioner is dissatisfied that the courts below did not extend the *nullum tempus* doctrine to contracts entered by public bodies, and seeking to create an issue for this Court's determination, asserts that the Seventh Circuit

failed to consider and predict how the Illinois Supreme Court would determine the validity of the contractual limitations clause. Petitioner's argument ignores the careful determinations and predictions made by the courts below and should be rejected. The courts fulfilled their obligation to determine state law and correctly determined that under Illinois law, the contractual limitations clause was valid and enforceable.

The courts below followed appropriate guidelines in determining the issue of Illinois law before them. As a court sitting in diversity, each judge was obligated to ascertain and apply state law and to determine whether there was a controlling decision by the state's highest court. In the absence of such a decision, the courts were required to look to the decisions of intermediate appellate courts unless other persuasive data indicated that the highest court of the state would decide the question otherwise.[4] *Commissioner v. Estate of Bosch*, 387 U.S. 456,

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[4] The Seventh Circuit regularly follows these guidelines. *L.S. Heath & Son v. A.T. & T. Information Systems*, 9 F.3d 561, 574 (7th Cir. 1993) ("In the absence of a decision by the highest state court, we should decide the matter in the way we divine that the highest state court would rule if the issue were squarely presented to it."); *Ludwig v. C & A Wallcoverings, Inc.*, 960 F.2d 40, 42 (7th Cir. 1992) ("In exercising our obligation to provide meaningful appellate review in diversity cases, we must strive to parse state law and, if necessary, forecast its path of evolution."); *Green v. J.C. Penney Auto Ins. Co., Inc.*, 806 F.2d 759, 761 (7th Cir. 1986) (court's duty in a diversity case is to apply the state law that would be applied in this context by the Illinois Supreme Court; intermediate appellate court cases are useful but not binding evidence of what the Illinois Supreme Court would do in a similar case).

465 (1967); *West v. American Teleph. & Teleg. Co*, 311 U.S. 223, 237 (1940). The courts below performed their duty and gave proper regard to relevant rulings of the state courts.

The district court and court of appeals agreed with respondent's argument that *A, C & S* was distinguishable from the present case and that the rule of *Lake in the Hills* should apply. Pet. 4-5. Petitioner, however, argues that the courts below should have extended the doctrine of *nullum tempus* further than any other court[5] in order to nullify freely-negotiated contractual obligations. In rejecting petitioner's arguments, the courts below properly determined how the Supreme Court of Illinois would resolve the issue.

In its opinion, the district court analyzed the recent holdings in *A, C & S* and *United States Fidelity & Guaranty Co. v. Wilkin Insulation Co.*, 550 N.E.2d 1032 (Ill. App. Ct. 1989), *aff'd*, 578 N.E.2d 926 (Ill. 1991)[6] and distinguished them from the instant case, recognizing that although these cases "do involve asbestos giving them a factual similarity to this case, they do not involve the legal question presented by the case at bar." Pet. App. 12a. As a factual matter, *A, C & S* was a *tort* suit brought by the Board to recover for property damage caused by the presence of asbestos, and was governed by a statute of limitations. In contrast, this case involves a suit on a contract – a contract in which the parties expressly

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[5] *See*, cases cited *infra* note 11.

[6] *Wilkin* involves a dispute between an asbestos manufacturer and its insurer and concerns neither a statute of limitations nor contractual limitations issue.

addressed the period of time during which the insured could institute suit and agreed to 12 months – and the district court *predicted* that the rule in *Lake in the Hills* would be the one adopted by the highest court of the state. Pet. App. 12a. Furthermore, the court supported its reasoning with public policy considerations, noting that "a rule of law that made suit limitations provisions unenforceable against government bodies in some circumstances [would have adverse effects] with respect to the premiums paid by and the ability to obtain insurance of those bodies because it would increase the risk assumed when the insurance is written." Pet. App. 14a.

In its affirmation of the district court's holding, the court of appeals expressly approved the lower court's determination of state law. Pet. App. 5a ("*Under Illinois law,* the district court properly held that the limitations clauses in the policies entitled [respondent] to judgment.") (emphasis supplied). Like the district court, the court of appeals specifically distinguished *A, C & S* from the present case.[7] The court not only relied on *Lake in the Hills* but also cited numerous lower court cases,[8] and

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[7] Petitioner argues that the court of appeals "failed to discuss any of the factors that were considered determinative by the Illinois Supreme Court in *A, C & S* when that court held that public policy required governmental immunity from *statutory filing* deadlines." Pet. 5 (emphasis added). The court of appeals did not discuss the factors developed in *A, C & S* because the court specifically *distinguished A, C & S* on its facts: "[*A, C & S*] is not to the contrary because it involved a *statute of limitations rather than contractual terms.*" Pet. App. 5a (emphasis added).

[8] The Seventh Circuit cited the following cases from the Circuit Court of Cook County which held that Boards of Education were not immune from contractual suit limitation

further indicated that "the Illinois Supreme Court has acknowledged that public entities are not immune from performing contractual obligations [citing *Wall v. Chicago Park Dist.*, 37 N.E.2d 752 (Ill. 1941)]." Pet. App. 5a.

Petitioner's argument that the court of appeals "failed to give any reason why it believed that the Illinois Supreme Court would conclude that the same public policy reasons that justified vitiating time deadlines imposed by the state legislature would not also justify vitiating time deadlines in a private contract" (Pet. 5) is mistaken. In its determination of how the highest court in the state would resolve the issue, the court of appeals considered both case law from the Illinois Supreme Court as well as broad public policy concerns, correctly recognizing that "[w]ithout such a [suit] limitation, [respondent] would obviously have demanded a higher premium and set other conditions in the policy." Pet. App. 5a. The petitioner's argument that the court of appeals "overlooked Illinois Supreme Court precedent holding that

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provisions. All of these cases involved the identical factual and legal issue presented in this case, i.e., claims against insurers for the costs of removing asbestos from public schools. *Home v. Evanston Township H.S. Dist. No. 202*, No. 92 CH 11144; *Continental v. Township H.S. Dist. No. 214*, No. 93 CH 01703; *Aetna v. Community Consol. School Dist. No. 21*, No. 93 CH 3200, consolidated with No. 93 CH 5642; *Community Consol. School Dist. No. 15 v. Centennial*, No. 93 CH 08069; *Northfield Township H.S. Dist. No. 225 v. Ins. Co. of North America*, No. 93 CH 017143; *Consol. H.S. Dist. No. 230 v. Ins. Co. of North America*, No. 93 CH 07976; *Board of Education of Township H.S. Dist. No. 211 v. International Ins. Co.*, No. 93 CH 000771; *Board of Education of Main Township H.S. Dist. No. 207 v. International Ins. Co.*, No. 93 CH 6766. Pet. App. 4a.

contractual deadlines must give way to public policy in other situations" (Pet. 5) is similarly without merit, as the petitioner presented these arguments below and the court considered and rejected them.

In essence, petitioner's claim that the Seventh Circuit based its determination of state law on "a decision from a *single* lower state court decision . . . [in order to] avoid thinking hard about how *this* case would actually be handled in the Illinois Supreme Court" (Pet. 16 (emphasis in original)) is simply incorrect.[9] In its briefs below, the petitioner relied heavily on *A, C & S*, a recent Illinois Supreme Court case discussing factors for determining whether *nullum tempus* immunity applies to legislatively-created statutes of limitations in tort suits. Without offering any authority suggesting that a freely-negotiated contractual provision[10] may be transformed into a statutory

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[9] The petitioner's statement also does not reflect Seventh Circuit precedents. *See, Diesel Service Co. v. AMBAC Int'l Corp.*, 961 F.2d 635, 639 (7th Cir. 1992) ("While we will always follow a state supreme court's interpretation of its law, an unclear opinion from a single state trial court is not binding, particularly when there are other cases which point in a different direction."); *Hill v. International Harvester Co.*, 798 F.2d 256, 261 n. 12 (7th Cir. 1986) ("[T]he Illinois Supreme Court is the final authority on matters of Illinois law and . . . an intermediate appellate court decision is not binding evidence of state law in circumstance when it is not a good predictor of what the state's highest court would do in a similar case."). *See also*, cases cited *infra* note 17.

[10] Petitioner's claim that the filing deadline was "statutorily mandated" (Pet. 16) is in error. Although a 12-month limitation suit is an administratively mandated minimum for fire policies, it is specifically not mandated for non-fire risks, such as those included within the Board's policies and sued

limitation, and without regard to the fact that neither the Illinois Supreme Court nor any other court in this country has *ever* granted municipal immunity from breach of contractual obligations,[11] petitioner argued that *nullum*

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upon here. 50 Ill. Admin. Code, 1-2301.60. The Board bid out its own specifications for the insurance sought and reserved the right to reject any portion of any bid submitted. The Board was statutorily free to negotiate a longer limitations period.

[11] Courts throughout the nation have agreed with the Illinois courts that governmental entities are not immune from their breach of contractual limitations, regardless of the impact on public funds. *See, e.g., State Ex Rel Udall v. Colonial Penn. Ins. Co.*, 812 P.2d 777, 778-780 (N.M. 1991); *General State Authority v. Planet Ins. Co.*, 346 A.2d 265 (Pa. 1975) (rejecting argument that public entity should be excused from breach of suit limitations clause in fire policy because of "the peculiar context of governmental relationships prevailing"); *United States v. Chicago, R.I. & P.R. Co.*, 200 F.2d 263 (5th Cir. 1952); *United States v. Seaboard Airline Ry. Co.*, 22 F.2d 113, 116 (4th Cir. 1927) (upholding limitation provision in rail bill of lading and noting, "We know of no principle of law under which the government, after receiving the benefits of a contract into which it has lawfully entered, can repudiate the conditions upon which the contract was made."); *United States v. The South Star*, 115 F. Supp. 102 (S.D.N.Y. 1953) *aff'd*, 210 F.2d 44 (2d Cir. 1954); *Grace Line v. United States*, 255 F.2d 810 (2d Cir. 1958); *United States v. Framen Steel Supply Co.*, 435 F. Supp. 681 (S.D.N.Y. 1977); *United States v. S.S. Claiborne*, 252 F. Supp. 897 (S.D. Ala. 1966); *Delaware, L. & W. R. Co. v. United States*, 123 F. Supp. 579 (S.D.N.Y. 1954); *Hughes Transportation Co. v. United States*, 121 F. Supp. 212 (Ct. Cl. 1954). *Cf., United States v. Republic Ins. Co.*, 775 F.2d 156 (6th Cir. 1985) (subrogation rights of United States subject to contractual suit limitation); *United States v. Eastern Airlines, Inc.*, 366 F.2d 316 (2d Cir. 1966) (rights of United States as lessor of property subject to contractual suit limitation under insurance policy on that property which lessee was contractually required to maintain). A thorough search reveals no reported decision in *any* court in *any*

*tempus* should apply. The court of appeals, however, determined that the appropriate question to be addressed was whether public entities may bind themselves contractually and examined Illinois cases on this point.

The courts below carefully and rigorously examined the issue of whether the doctrine of *nullum tempus* applied to contractual suit limitation provisions in an insurance policy and answered in the negative. In so doing, they put on their best "soothsayer hats"[12] to predict how the highest court of Illinois would resolve the issue, considering both Illinois Supreme Court precedent and the public policy considerations relevant to those holdings. Their decisions should not be disturbed.

## B. THE PURPORTED CONFLICT AMONG THE CIRCUITS IDENTIFIED BY PETITIONER DOES NOT INVOLVE THE ISSUE PRESENTED IN THIS CASE.

In an attempt to frame an issue that would warrant a grant of a writ of certiorari, petitioner suggests a conflict among the circuit courts. As a preliminary matter, it must be noted that the 'conflict in the circuits' identified by

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jurisdiction which supports petitioner's argument that *nullum tempus* should be extended to contractual provisions.

[12] *See e.g., Jones v. Irvin*, 602 F. Supp 399, 401 (S.D. Ill.1985) ("[A]s is so often the case when Illinois law is silent on the subject, this Court must put on its soothsayer hat and predict what the Illinois Supreme Court would decide if it were faced with this issue.").

petitioner does not relate to a substantive decision rendered by the Seventh Circuit "in conflict with the decision of another United States court of appeals on the same matter" (Rule 10.1(a)) or a conflict in the interpretation of any particular statute or body of law. *Cf., Braxton v. United States*, 500 U.S. 344 (1991) (certiorari granted to resolve conflict concerning the meaning of federal sentencing guidelines); *National Ass'n of Greeting Card Publishers v. United States Postal Service*, 462 U.S. 810 (1983) (conflict in circuits regarding postal rate procedures); *Snyder v. Harris*, 394 U.S. 332, *reh'g denied*, 394 U.S. 1025 (1969) (conflicting interpretations of requirements to satisfy 28 U.S.C. § 1332). The "conflict" is rather an alleged difference in approach and philosophy by certain judges in the manner of *predicting* state law. This does not create the special and important reasons required by this Court's Rule 10.1.

Moreover, the Seventh Circuit cases criticized by petitioner concern a party who is pursuing an innovative, novel claim which has never before been accepted by any state court. In those cases, commentators have identified a reluctance by the Seventh Circuit to adopt the innovative claim. *See*, 19 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 4507, at 25 (Supp. 1994). Although petitioner presents an interesting academic issue, the purported conflict identified by petitioner bears no relationship to the matter below. The courts below were not presented with an innovative claim; the law concerning contractual limitations clauses was well settled and the courts easily determined applicable state law.

Petitioner claims that the Seventh Circuit "has become the leading exponent of the view that federal courts called upon to apply state law should be reluctant to 'predict' how the state's highest court would rule on a question that has not previously been presented to it." Pet. 6. In support of this claim, petitioner quotes language from various Seventh Circuit opinions that are taken out of context and misleading. Far from supporting petitioner's contention, these cases give express recognition to the Seventh Circuit's policy that a federal court must predict state law as applied by the state's highest court in order to discourage forum-shopping.[13] For example, in *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222 (7th. Cir. 1993) (cited at Pet. 8), the plaintiff sought to impose liability for invasion of privacy on a defendant whose book had truthfully revealed instances of heavy drinking and misconduct in the plaintiff's life. In refusing to hold that the tort of invasion of privacy applied to the revelations made in defendant's book, the court noted that "[n]o modern cases . . . [in any of the jurisdictions considered] go as far as the plaintiffs would have us go in this case," and that "Illinois has been a follower rather than a leader in recognizing claims of invasion of privacy." 8 F.3d at

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[13] As noted in the cases cited *supra* note 4, the Seventh Circuit recognizes its responsibility to predict and decide matters of state law, and the court of appeals is best qualified to determine matters of state law. *Commissioner v. Estate of Bosch*, 387 U.S. 456, 462 (1967); *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944). If the Seventh Circuit takes a conservative approach towards determining innovative state law claims, it is only because it recognizes and follows the conservative nature of the Illinois Supreme Court. *See, e.g., Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1234 (7th Cir. 1993).

1234. Thus, *Haynes* is not a case, as petitioner suggests, representing the Seventh Circuit's view "that federal courts can and should refuse to apply 'innovative' state law doctrines even in cases where the highest court in the state *probably would be receptive* to those new doctrines." (Pet. 8) (emphasis added). Rather, it is a case where, noting that "Illinois has been a follower rather than a leader" in the area, the Seventh Circuit refused to adopt, under the guise of Illinois law, a radical extension of a tort doctrine beyond virtually all existing common-law precedent.

In *Shields Enterprises, Inc. v. First Chicago Corp.*, 975 F.2d 1290 (7th Cir. 1992), in addressing plaintiff's state law tort claim for damages caused by economic duress, the Seventh Circuit noted that "no Illinois court had ever recognized a damage action for economic duress" and that "one Illinois appellate court has expressly rejected that action." 975 F.2d at 1297. The Seventh Circuit concluded that they were "bound to follow [the Illinois appellate court decision] as authoritatively stating Illinois law absent a good reason to think the Illinois Supreme Court would reject" it. *Id.* Thus, besides reflecting the recognition of the duty to predict the resolution of state law that the state supreme court would endorse, *Shields* implies that in making this prediction, a holding of an appellate court is data to be considered by the federal court: "Absent clearer evidence of how the Illinois Supreme Court would decide, we are unwilling to 'speculate on any trends in Illinois law,' *especially when an Illinois appellate court has expressly rejected the action [plaintiff] seeks to bring.*" *Id.* at 1298 (language not included in petitioner's quotation emphasized).

As cases cited in the petition indicate, the Seventh Circuit has no reluctance to predict state law.[14] Rather, in a response to forum-shopping by plaintiffs, certain Seventh Circuit panels, primarily led by Judge Posner[15] have promulgated a policy of refusing to indulge plaintiffs' requests for a radical departure from local precedents when their arguments have no basis in state law. *See, Afram Export Corp. v. Metallurgiki Halyps, S.A.*, 772 F.2d 1358 (7th Cir. 1985) (cited at Pet. 9, n.7) (court refused to

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[14] *Affiliated FM Ins. Co. v. Trane Co.*, 831 F.2d 153, 155 (7th Cir. 1987), cited by petitioner, demonstrates the Seventh Circuit's recognition of the federal court's duty to step into the shoes of the state supreme court justices and resolve the state law issue as they would. In refusing plaintiff's request to extend the scope of products liability law in Wisconsin, the Seventh Circuit noted that "the Wisconsin Supreme Court has recognized . . . [that] such broad public policy issues are best handled by legislatures" and that "the Wisconsin Supreme Court has been reluctant to expand strict liability law."

[15] *Haynes v. Alfred A Knopf, Inc.*, 8 F.3d 1222 (7th Cir. 1993); *Shaw v. Republic Drill Corp.*, 810 F.2d 149 (7th Cir. 1987) (*per curiam*) (rejecting novel state law claim); *Anderson v. Marathon Petroleum Co.*, 801 F.2d 936 (7th Cir. 1986) (rejecting "adventurous departure in state common law"); and *Afram Export Corp. v. Metallurgiki Halyps, S.A.*, 772 F.2d 1358 (7th Cir. 1985) (rejecting innovative and bold departure in area of law), all cited by petitioner, are all opinions written by Judge Posner. In cases in which there is no innovative or novel claim, such as the one presented herein, Judge Posner follows appropriate guidelines and willingly predicts how the state supreme court would determine issues of state law. *Konradi v. United States*, 919 F.2d 1207, 1213 (7th Cir. 1990) (Posner, J.) ("The decision of a federal court in a diversity case, or in any other case in which state law supplies the rule of decision, is an exercise in predicting how the highest court of the state would decide the case if it were presented to it."). *See also*, cases cited *infra* note 17.

reward a plaintiff's abuse of diversity jurisdiction in order to effect a bold departure from existing precedents). These cases, however, are consistent with numerous Seventh Circuit decisions which clearly predict how the highest state court would resolve the issue by considering data such as decisions from lower state courts.[16]

Petitioner's view of the Seventh Circuit's approach is at best confused, as petitioner itself notes cases in which the Seventh Circuit expressed its "*willingness* to predict that a highest state court would change or extend current

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[16] Indeed, each of the circuit judges who joined in the opinion below (Judges Fairchild, Cummings and Bauer) regularly comply with this procedure. *White v. United States*, 680 F.2d 1156, 1159 (7th Cir. 1982) (Bauer, J.) ("The district court therefore properly recognized its duty to decide what position the Indiana Supreme Court would take if confronted with this problem."); *In re Air Crash Disaster Near Chicago, Illinois*, 771 F.2d 338, 339 (7th Cir. 1985) (Judges Fairchild and Bauer joined Judge Wood's opinion that "this court is not bound by a state appellate court interpretation of state law if we are convinced that the state supreme court would decide the issue differently. . . . "). Judge Cummings, who wrote the opinion below, stated in *Green v. J.C. Penney Auto Ins. Co., Inc.*, 806 F.2d 759, 761 (7th Cir. 1986):

> This case involves several questions of state law which have not yet been precisely articulated by the courts of Illinois. It is therefore useful at the outset to keep in mind our duty in a diversity case: we must apply the state law that would be applied in this context by the Illinois Supreme Court.

In making this prediction, Judge Cummings stated that "[i]ntermediate appellate court cases are useful but not binding evidence of what the Illinois Supreme Court would do in a similar case." 806 F.2d at 761. Obviously, Judge Cummings would not agree with petitioner's statement that the judges below "woodenly followed the ruling of an Illinois intermediate appellate court case" (Pet. 7).

doctrine." (Pet. 9, n.7). Finding "more numerous" cases where the Seventh Circuit refused to apply innovative state law, petitioner concludes that the Circuit has developed a distinctive "approach" where it gives "controlling significance to any decision on point from a state intermediate appellate court."[17] (Pet. 9). While the issue of whether decisions relating to innovative claims and followed in certain cases may be deemed the "approach" of the entire Seventh Circuit is an interesting topic for an academic discussion, it is not an issue relevant to the case at hand and does not present a case or controversy for determination by this Court.

## CONCLUSION

The precise relief sought by petitioner if a writ were granted is unclear, as petitioner asks this Court only to "set forth the controlling principles." Pet. 8. The dilemma presented by any attempt to define what this Court is

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[17] As stated *supra* note 9, petitioner's statement is incorrect. Indeed, Judge Posner wrote in *Williams, McCarthy, Etc. v. Northwestern Nat. Ins.*, 750 F.2d 619, 622 (7th Cir. 1984), "the Illinois Supreme Court is the final authority on the meaning of Illinois statutes and . . . an intermediate appellate court decision is not binding evidence of state law in circumstances when it is not a good *predictor of what the state's highest court would do in a similar case.*" (emphasis added). *See also, Eljer Mfg., Inc. v. Liberty Mut. Ins. Co.*, 972 F.2d 805, 814 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1646 (1993) ("Even when a state's intermediate appellate decisions are uniform, or at least reasonably so, . . . we are not bound by them. But we do need, in such a case, a reason for predicting that the state's supreme court will reject the intermediate decision.").

asked to do demonstrates the absence of any issue. The Court cannot be asked to resolve a conflict in the circuits because there is none. The Court cannot be asked to tell the Seventh Circuit how to determine and predict issues of state law, because the Seventh Circuit already performs this duty in accordance with well-established legal principles. The Court cannot tell the Seventh Circuit to interpret innovative claims more expansively than the state courts, because this is incompatible with *Erie*.

If this Court were to grant the writ, determine that federal courts must not be reluctant to predict how the state's highest court would rule on a question of state law, and remand this case, it is difficult to imagine that the Seventh Circuit's determination of Illinois law on the issue would be any different, especially since the courts below relied on Illinois Supreme Court precedent and the author of the opinion below had previously written that it is the duty of a federal court "to apply the law that would be applied . . . by the Illinois Supreme Court." *Green v. J.C. Penney Auto Ins. Co., Inc.*, 806 F.2d at 761. (Cummings, J.)

The petitioner sets forth no special or important reasons for this Court to consider, and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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